IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.395 OF 2004

Mrs. Asha Damodar Shetty
and Anr. ....Petitioners

V/s

Mr. Deepak Dedge & Ors. ...Respondents.

Mr. S. Keote with J.G. Shetty for the petitioners.
Mr. S.J. Rairkar for respondent No.1.
Mr. S.R. Shinde, APP for the State.

CORAM: V.M.KANADE,J.
DATE: 11th April 2005

P.C.:

1. Heard the learned Counsel for the applicant and the learned Counsel for respondent No.1.

2. Petitioner is challenging the issuance of process by the Judicial Magistrate, First Class, Court No.8 Pune in a complaint filed by respondent No.1 under section 138 of the Negotiable Instruments Act. Petitioner is also challenging the Judgment and Order passed by the Sessions Judge dismissing the Criminal Revision Application No. 777 of 2003 preferred by the Petitioner.

3. It is submitted by the learned Counsel appearing for the petitioner that as per clause 2 of the agreement dated 4/2/2000, it is agreed that an amount of Rs 1,90,000/- and Rs 10,00,000/- will be paid by

cheque. It is submitted that it was specifically mentioned in clause 2 that if the cheque is not honoured, the purchaser will be liable to pay interest at the rate of 21% p.a. till 30/4/2000 and, thereafter, this agreement shall stand terminated. It is submitted that the complainant had filed a civil suit after two cheques were dishonoured. However, he did not succeed in the suit and civil court has held that no amount was due and payable to respondent No.1. It is submitted that, therefore, the present complaint which is filed under section 138 is not maintainable as the finding is given by the civil court that there is no existing debt or liability.

4. The learned Counsel appearing on behalf of respondent No.1 has submitted that merely because civil suit is dismissed that would not take away right of the complainant to file complaint under section 138 of the Negotiable Instruments Act. The learned Counsel for the respondent No.1 has relied upon the judgment of the Supreme Court in the case of M.M.T.C. Ltd. and another Vs. Medchl Chemicals and Pharma (P) Ltd and another, reported in (2002) 1 SCC 234 in which the Apex Court has observed that if an application is filed under section 482 by the accused, the High Court should not examine the merits of the complaint and

interfere with the issuance of process. The Supreme Court has further observed that onus to prove the nonexistence of debt or liability lay on the drawer and had to be discharged at the trial.

5. After having perused the complaint and the agreement between the parties, I am of the view that the submissions made by the learned counsel for the petitioners cannot be accepted. The question whether there is an existing liability or not can only be decided at the time of the trial after the evidence is adduced by both the parties. Under section 139 of the Negotiable Instruments Act, a presumption is raised against the drawer of the cheque and the said presumption has to be rebutted at the time of the trial. Therefore, it is not possible to interfere with the order of issuance of process. All questions raised in this petition are kept open. Trial Court to decide all the questions raised in this petition after the evidence is adduced by both the parties on merits and in accordance with law. However, Petitioner No.1 may be exempted from appearing in court whenever an application for exemption is filed by her. Petitioner No.1 may be directed to remain present in Court only at the time of recording of statement under section 313 of the Criminal Procedure Code or if her presence

is otherwise required. Plea of the petitioner No.1 may be recorded through her advocate.

6. With the above directions, Criminal Writ Petition is dismissed.

V.M. KANADE, J.